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No. 02-626 (4)

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, and CHARLES H. BRONSON, as the FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, the Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and Charles H. Bronson, as the Florida Commissioner of Agriculture, request leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Consent for *amici* participation was requested for the Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation, but was denied by the Miccosukee Tribe of Indians by letter dated November 5, 2002, and denied by the Friends of the Everglades in a letter dated November 7, 2002. Requested consent for amicus participation for Commissioner Bronson was denied by the Miccosukee Tribe of Indians by letter dated November 15, 2002; no response was received from the Friends of the Everglades.

The Florida Fruit and Vegetable Association is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The Florida Fruit and Vegetable Association represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The American Farm Bureau Federation is a voluntary general farm association organized in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. American Farm Bureau Federation has member organizations in all 50 states and Puerto Rico, representing more than five million member families. The American Farm Bureau Federation has participated as *amici curiae* in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeal, including issues arising under the Clean Water Act.

The Florida Farm Bureau Federation is one of the constituent members of the American Farm Bureau Federation. It represents the interests of farmers and ranchers in Florida. The Florida Farm Bureau Federation is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

American farmers and ranchers represented by the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food, fiber and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether.

Charles H. Bronson, the Florida Commissioner of Agriculture, supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV, Section 4(f), of the Florida Constitution, except as otherwise provided by law. The Commissioner of Agriculture is also the head of the Florida Department of Agriculture and Consumer Services under Section 20.14(1) Florida Statutes, and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07(13), Florida Statutes. The Florida legislature has declared in Section 604.001(2) & (5), Florida Statutes that "[t]he production of agricultural commodities in this state is a large and basic industry that is important to the health and welfare of the people and to the economy of the state" [and] "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." Under Sections 570.074 and 570.085, Florida Statutes, the Commissioner has created and oversees an office of water coordination for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

The three organizations and the Florida Commissioner of Agriculture are keenly aware of the changing position of the United States within the international trade world. This change is bringing opportunities, challenges, and threats to

United States growers and ranchers. The movement toward freer trade in the western hemisphere brings new and continued competitive challenges to United States agriculture, which strives to produce competitive products despite environmental laws which sometimes impair the ability to compete.

In order to keep American farm products competitive, the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, provides agricultural exemptions for the discharge of water used for the production of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of pollutants into the nation's waters. *See* 33 U.S.C. § 1342 ("Section 402"). The Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, Florida Commissioner of Agriculture seek to support the petition for a writ of certiorari to prevent a fundamental change in the implementation of the agricultural exemptions, which the Eleventh Circuit's expansive decision appears to authorize.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." The definition of "point source" for that program specifically excludes agricultural discharges, stating: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The NPDES statute prohibits any permit requirements for these agricultural discharges, stating: "The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit." 33 U.S.C. § 1342(l).

The rules implementing the agricultural exemptions further explain what is and is not a "point source" under the statutory definition of the NPDES program. Specifically, 40 C.F.R. § 122.3(e) provides, in pertinent part, that discharges from the "introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands" do not require NPDES permits.

While the NPDES permit program has been controversial, complex and contentious since its inception, historical implementation of the agricultural exemptions has not generated nearly as much litigation. That is because the United States Environmental Protection Agency ("EPA") and state deferral agencies implementing the NPDES program lack regulatory control over discharges from the production of crops.

Farmer and rancher members in the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation, and the Florida Commissioner of Agriculture have a direct interest in the outcome of this case. That interest is to ensure the agricultural exemptions in the NPDES program continue to be as effective as in the past. The last thing farmers and ranchers need, at what is already a time of economic crisis in the industry, is an erosion of these exemptions and the related increase in their costs of doing business. Any diminution of the full impact of the agricultural exemptions will prevent farmers and ranchers from producing crops that are competitively priced in the world market.

For the reasons stated above, the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture respectfully request that the Court grant their motion for leave to file this brief *amici curiae*.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE FLORIDA FRUIT & VEGETABLE ASSOCIATION, FLORIDA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, and CHARLES H. BRONSON, as FLORIDA COMMISSIONER OF AGRICULTURE IN SUPPORT OF THE PETITION

The Florida Fruit & Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and Florida Commissioner of Agriculture respectfully submit this brief as amici curiae[1].

[1] Counsel for *amici curiae* has authored this brief in whole and no other person or entity other than *amici*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI CURIAE*

The Florida Fruit and Vegetable Association is a non-profit, agricultural trade organization headquartered in Orlando, Florida. Its mission is to enhance the competitive and business environment for producing and marketing fruits, vegetables, and other crops. The Florida Fruit and Vegetable Association represents and assists its membership on a broad range of farming issues, including environmental protection, marketing, labor, food safety, and pest management. These services help Florida growers set the standard for competitively producing an abundant supply of safe, affordable fruits, vegetables and other crops. Its members produce much of the winter vegetable crop for the United States.

The American Farm Bureau Federation is a voluntary general farm association organized in 1920. It was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. American Farm Bureau Federation has member organizations in all 50 states and Puerto Rico, representing more than five million member families.

The Florida Farm Bureau Federation is one of the constituent members of the American Farm Bureau Federation. It represents the interests of farmers and ranchers in Florida. The Florida Farm Bureau Federation is composed of 62 county farm bureaus with more than 143,400 member families. It is headquartered in Gainesville, Florida.

Charles H. Bronson, the Florida Commissioner of Agriculture, supervises all matters pertaining to agriculture in the State of Florida, pursuant to Article IV Section 4(f) of the Florida Constitution, except as otherwise provided by law. The Commissioner of Agriculture is also the head of the Florida Department of Agriculture and Consumer Services under Section 20.14(1) Florida Statutes, and is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under Section 570.07 (13),

Florida Statutes. The Florida legislature has declared in Section 604.001(2) & (5) Florida Statutes that "[t]he production of agricultural commodities in this state is a large and basic industry that is important to the health and welfare of the people and to the economy of the state" [and] "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." Finally, under Sections 570.074 and 570.085, Florida Statutes, the Commissioner has created and oversees an office of water coordination for the purpose of engaging in any matter "relating to water policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies."

The Commissioner's participation in this matter flows from his constitutional and statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state.

American farmers and ranchers represented by the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, and American Farm Bureau Federation own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether.

American farm products remain competitive in the world market due in part to the regulatory scheme of one environmental law, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. The CWA does this by providing agricultural exemptions for the discharge of waters used for the production of crops. 33 U.S.C. §§ 1342(l) and 1362(14). These

exemptions are part of the National Pollutant Discharge Elimination System ("NPDES") component of the CWA, a permit program to limit the discharge of industrial wastes into the nation's waters. *See* 33 U.S.C. § 1342 ("Section 402").

If the Eleventh Circuit's decision stands, the South Florida Water Management District ("SFWMD") will have to increase its budget to pay for the expensive NPDES permitting process for S-9, the pump station that moves water from one side of a levee to the other in the same watershed. The SFWMD will more than likely obtain the funding to obtain and implement this NPDES permit by increasing agriculture privilege taxes, ad valorem taxes on property owners in the District, fees, and assessments. *See, e.g.*, § 373.503, Fla. Stat. (2002). This would significantly and adversely impact the ability of farmers and ranchers to competitively market their crops in today's international markets. It is possible the technologies required by the permit will compel the creation of stormwater treatment areas. If that is the case, the SFWMD may use its condemnation power to take the land of farmers and ranchers, thereby further adversely impacting them.

Farmer and rancher members in the Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture have a direct economic interest in the outcome of this case. The interest is to ensure the agricultural exemptions from the NPDES program continue to be effectively implemented as in the past. If the Eleventh Circuit's decision is not reversed, the effective impact of the agricultural exemptions could be eroded and thwarted through increased taxes, fees and/or assessments imposed by the SFWMD to pay for NPDES permits and technologies for the S-9 pump station. In addition, the District's 61 other pumps like it that move water within the same watershed will likely require NPDES permits, all at a substantial cost the SFWMD will pass on to farmers, ranchers, and others.

ARGUMENTS

I. THE ELEVENTH CIRCUIT'S DECISION WOULD HAVE THE EFFECT OF OVERRIDING THE AGRICULTURAL EXEMPTIONS OF THE NPDES PROGRAM.

A. Agricultural Exemptions from the NPDES Program

The CWA prohibits the discharge of pollutants into the waters of the United States unless the discharge is allowed by the NPDES component of the CWA. 33 U.S.C. § 1311(a); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1524-1525 (11th Cir. 1996). Permits for discharges into the nation's waters are issued by the United States Environmental Protection Agency ("EPA") or by a state permitting program. 33 U.S.C. §§ 1342(a) & 1342(c). EPA authorized Florida's Department of Environmental Protection ("FDEP") to administer the NPDES program in 1995. *See* § 403.0885, Fla. Stat. (2002).

The NPDES program does not require permits for discharges from the production of agricultural crops. It expressly provides exemptions for agricultural discharges. 33 U.S.C. §§ 1342(l) and 1362(14). The Florida Fruit and Vegetable Association, Florida Farm Bureau Federation, American Farm Bureau Federation, and the Florida Commissioner of Agriculture seek to prevent a fundamental change in the implementation of these agricultural exemptions which the Eleventh Circuit's expansive decision appears to authorize.

The NPDES program limits the flow of pollutants into the nation's waters by regulating discharges from "point sources." A "point source" regulated by the NPDES program is defined in 33 U.S.C. §1362(14). Certain agricultural

discharges are excluded by definition from regulation by the NPDES program because they are not "point sources". A "point source" is defined as follows (emphasis added):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

The NPDES program also prohibits any permit requirements for agricultural discharges, stating in 33 U.S.C. § 1342(l):

> The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly require any State to require such a permit.

The rules implementing the agricultural exemptions explain by examples what is and is not a "point source" under the statutory definition of the NPDES program. For example, 40 C.F.R. §122.3(e) provides, in pertinent part, that the following discharges do not require NPDES permits:

> Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands. . . .

B. Legislative History of the Agricultural Exemptions

The CWA originated from the 1972 amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. The CWA focused on regulating "point source" discharges which flow into the nation's waters. The 1972 amendments required effluent limitations to be placed upon

"point source" discharges through a federally mandated permit system, the NPDES program. Pub. L. 92-500, § 402; 86 Stat. 816, 880-883 (1972), *codified as amended* 33 U.S.C. § 1342 (2001).

The NPDES program did not cover nonpoint sources when the CWA was adopted in 1972; instead, these sources were left primarily to the states to address through a planning process described in the program. Pub. L. 92-500, § 208 (1972); 86 Stat. 816, 839-841, *codified as amended*, 33 U.S.C. § 1288 (2001); S. Rep. No. 414, 92d Cong., 1st Sess. 139, ("S. Rep. 92-414"), *reprinted in* 1972 U.S.C.C.A.N. 3668. As a consequence, when Congress adopted the NPDES program, it did not require a permit for agricultural runoff. Pub. L. No. 92-500, § 208(b)(2)(F), 86 Stat. 816, 841 (1972), *codified as amended*, 33 U.S.C. § 1288(b)(2)(F); S. Rep. 92-414, *reprinted in* 1972 U.S.C.C.A.N. at 3759-3760. As Senator Dole stated: "This bill would amend the Federal Water Pollution Control Act to place responsibility on the states for instituting and expanding the control of water pollution related to agriculture." S. Rep. 92-414 at 3759 (supplemental views of Sen. Dole).

In 1977, the exemption for "return flows from irrigated agriculture" was expressly added as an exclusion from the definition of "point source". Pub. L. 95-217, § 33(b); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1362(14) (2001). Also, the provision prohibiting NPDES permits for agricultural discharges was added. Pub. L. 95-217, § 33(c); 91 Stat. 1577 (1977), *codified as amended* 33 U.S.C. § 1342(l) (2001). The express exclusion from the definition of "point source" overrode a 1975 federal district court opinion holding the 1972 amendments to the Federal Water Pollution Control Act did not exclude point sources from agriculture from NPDES permitting. *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *affirmed sub nom. Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977).

The legislative history reveals Congressional intent that all sources of agricultural runoff, "regardless of the manner in which the flow was applied to the agricultural lands, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of section 208(b)(2)(F)." S. Rep. No. 95-217, 95th Cong., 1st Sess. 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360.

The exemption for "agricultural stormwater discharges" from the definition of "point source" was added by the Water Quality Act of 1987. Pub. L. No. 100-4, § 503; 101 Stat. 7, 75 (1987). By this exemption, Congress confirmed its intent that agriculture is not covered as industrial or municipal pollution under 33 U.S.C. § 1342(p).

A recent case interpreting the agricultural exemptions from the NPDES program is *Fishermen Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002). In that case, Closter Farms used "flood irrigation," a process where canals irrigate sugar cane. The canal water originates in Lake Okeechobee. It is forced from the canals "into the sugarcane fields by raising the water levels in the canals." *Id.* at 1297. The water is then discharged back into the lake. The grower also pumped the stormwater into Lake Okeechobee, rather than allowing it to follow its natural flow. The Eleventh Circuit held these discharges to the lake were not subject to NPDES program regulation. The court stated: "Nothing in the language of the statute indicates that stormwater can only be discharged where it naturally would flow. *See* 33 U.S.C. § 1362(14)." *Id.* at 1297. The court also held the canals used to irrigate the sugar cane fields through "flood irrigation" constituted a "return flow from irrigation agriculture," an activity excluded from the permitting requirements of the NPDES program. *Id.*

C. Effect of Eleventh Circuit's Decision on the Agricultural Exemptions

If the Eleventh Circuit's decision is allowed to stand, the SFWMD will have to treat the water pumped at S-9 in order to remove some of the pollutants in it, none of which have been added by the SFWMD. This water may contain pollutants from agricultural discharges exempted from the NPDES program. The treatment of water at S-9 will be expensive. Just the preparation of the NPDES application will be costly, requiring detailed data and modeling prepared by experts. In addition, the SFWMD will have to construct and implement treatment and monitoring technologies required by the resulting NPDES permit, assuming there are such technologies.

The SFWMD will bear the cost of the NPDES permitting process, as well as cost of the installation and monitoring technologies to treat the water at the S-9 pump station. The SFWMD will have to pay for these substantial costs by increasing one or more of its funding sources, which include ad valorem taxes on properties within the SFWMD's jurisdiction, agricultural privilege taxes, permit fees, and assessments. *See, e.g.*, § 373.503, Flat. Stat. (2002) (ad valorem taxing authority). Farmers and ranchers who own farms, groves and ranches in the SFWMD may therefore have to pay for the removal of pollutants required by an NPDES permit for S-9, even though agricultural discharges to the waters pumped by S-9 are exempt from the NPDES permitting program. Consequently, the benefits of the agricultural exemptions may be effectively overridden by the Eleventh Circuit's decision.

The additional regulatory costs created by the NPDES permit for S-9 may be passed to farmers and ranchers, and may increase the costs of producing agricultural products, resulting in a diminished ability to be competitive in the world market. As a consequence, the economic benefits

realized from the agricultural exemptions would be substantially eroded. If the Eleventh Circuit's decision stands, S-9 will be just one of 62 SFWMD pumps that may be required to have NPDES permits. The adverse economic impact on farmers and ranchers could be enormous.

II. THE ELEVENTH CIRCUIT ERRED IN FINDING THE MOVEMENT OF WATER IN THE LAKE OKEECHOBEE WATERSHED IS SUBJECT TO THE NPDES PROGRAM.

The SFWMD has responsibility to protect Florida's public water resources in the Lake Okeechobee watershed. § 373.4595, Fla. Stat. (2002). The U.S. Army Corps of Engineer's Central and Southern Florida Flood Control Project manages this responsibility, under the local sponsorship of the SFWMD. § 373.1501, Fla. Stat. (2002). There are many components in the complex system managing the water in this watershed, one of which is the S-9 pump. The S-9 pump facilitates the movement of water from one side of a levee to another within the watershed. S-9 is permitted under the Everglades Forever Act by the Florida Department of Environmental Protection ("FDEP"). § 373.4592(9)(k) & (l), Fla. Stat. (2002). The Everglades Forever Act has been approved as a part of Florida water quality standards by EPA.

In view of the above, the regulatory scheme for the Lake Okeechobee watershed controls sources of pollution. For that reason, there is no need, or authority, to ignore a statutory exemption and attempt to control nonpoint sources of pollution through judicial fiat. Yet that is the effect of the Eleventh Circuit's decision which declares the movement of water within the watershed is a "point source," when the SFWMD itself adds no pollutants to the water S-9 pumps.

III. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT AMONG CIRCUITS OVER THE APPLICABILITY OF THE NPDES PROGRAM TO THE MOVEMENT OF WATER CONTAINING PRE-EXISTING POLLUTANTS.

There are five significant federal circuit court decisions which have considered the general issue in this case. That issue is whether the discharge of water requires a permit even if the pollutants in the discharge are naturally occurring or added only by others. The decision of the Eleventh Circuit appears to conflict with decisions of the Fourth, Sixth, and District of Columbia Circuit Courts of Appeal.

Three federal district courts have interpreted the NPDES program to allow entities to move water without a permit if they have not added pollutants to it. The earliest case is *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976). In *Train*, the Fourth Circuit held that EPA's authority to regulate point source discharges of pollutants did not apply when the water being discharged by the power company contained pollutants not added by the company. *Id.* at 1373 and 1377. In the court's opinion, naturally occurring pollutants or those previously added by others did not subject the company to the NPDES permitting procedures. In order to be subject to the NPDES program, the discharging entity must have actually added the pollutants. *Id.* at 1377.

The next case dealing with this issue is *National Wildlife Federation v. Gorsuch*, 693 So.2d 156 (D.C. Cir. 1982). In this case, the court agreed with EPA's position that the "addition [of pollutants] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175. As a result, the NPDES program did not require "dam-induced water conditions" to be treated as "pollutants." *Id.* at 172. In so holding, the court observed: "Congress, although recognizing

the weaknesses of past state water pollution efforts, explicitly chose not to completely federalize water pollution control, but instead directed the states to establish their own pollution control programs under EPA oversight." *Id.* at 178. In reaching this decision, the court noted that "as a policy matter (and recognizing our limited role in reviewing agency policy decisions) we are not convinced that EPA's decision to leave dam regulation to the states was so misguided as to frustrate congressional policy. EPA contends that requiring permits for 2,000,000 dams would be an impossible task." *Id.* at 182.

Finally, in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the Sixth Circuit held that a hydro-electric facility's movement of pollutants already in water could not be considered an "addition of pollutants" regulated by the NPDES program. The court was particularly persuaded by the provision in the CWA allowing states to regulate nonpoint sources, including pollution from "dams, channels, flow diversion facilities, or other changes in the movement, flow or circulation of a navigable water." *Id.* at 588, refering to 33 U.S.C. § 1314(f)(2)(F).

Two other federal circuit courts have construed the NPDES program as prohibiting the movement of water, even though the entities moving the water did not actually add pollutants before or during the move. The most recent case is *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). In *Catskill*, the city used a tunnel to move water from one water body to another that was "hydrologically connected only insofar as both are tributaries of the Hudson" River. *Id.* at 484. The Second Circuit found it significant that the water was tunneled several miles from its source into a water body "utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed." *Id.* at 492.

In an earlier case, the First Circuit required a NPDES permit when a ski company moved water from a river, used it to make snow, and then discharged it into a pond. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1272 (1st Cir. 1996). The company did not add any pollutants during this process. The First Circuit distinguished *Gorsuch* and *Consumers Power* cases as they did not involve "moving different water from one flowing water body into another stationary, colder body." *Id.* at 1299.

These five cases all involved interpretations of the phrase "addition of any pollutant" in 33 U.S.C. § 1362(12). Three federal circuit courts limit jurisdiction of the NPDES program when there has been no introduction of pollutants during the movement of water from one place to another. Two courts reach the opposite result, holding that the entities moving the water may need NPDES permits even though the pollutants added to the receiving water body were not added by them.

In the instant appeal, the Eleventh Circuit adopted the rationale of the First and Second Circuits, thereby requiring the SFWMD to apply for a NPDES permit for S-9. The apparent split among these circuits warrants consideration of the conflict by this Court, particularly in view of the magnitude of the impact. For example, as the brief of the SFWMD reveals at page 24, if the Eleventh Circuit's decision stands, hundreds of thousands of water control structures will now need NPDES permits.

CONCLUSION

The petition for writ of certiorari should be granted. If it is not granted, the Eleventh Circuit's decision will have the effect of overriding the agricultural exemptions in the NPDES program, thereby placing American farmers and ranchers at a significant disadvantage in marketing their crops in today's international market.

Respectfully submitted,

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